



What's Next? The Legislative and Policy Landscape in the 118th Congress

December 14, 2022

GIBSON DUNN

MCLE Certificate Information

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ELECTION RESULTS

01

Election Results - Senate

U.S. Senate Election Results: Democrats Win

Democrats have kept Senate control by flipping Pennsylvania and holding on to competitive seats in Arizona and Nevada.

51

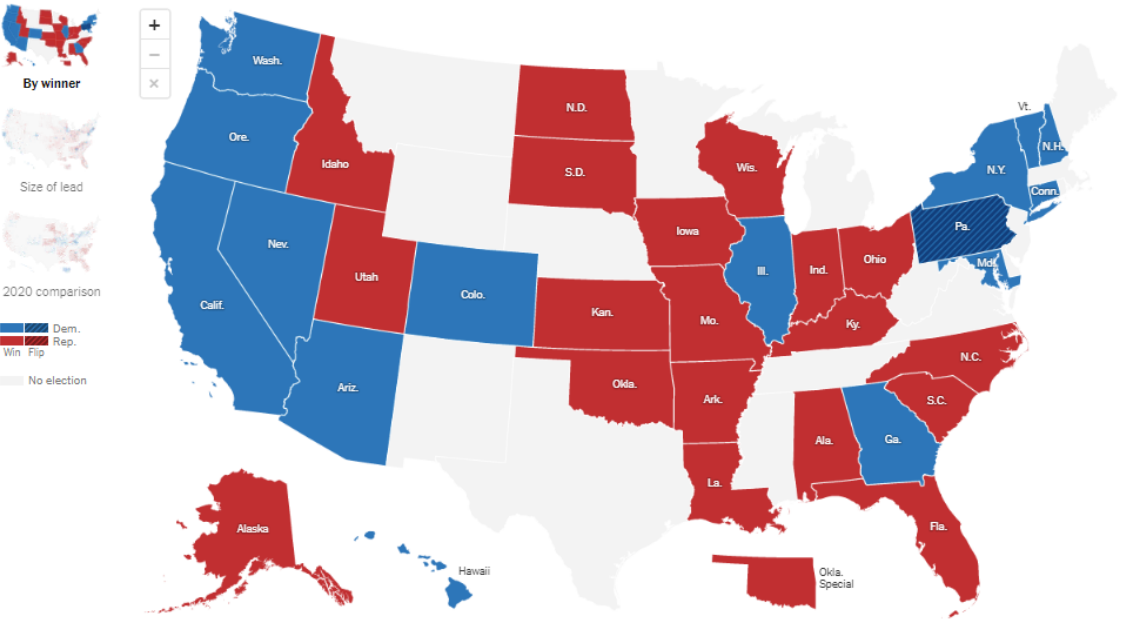
Democrats

49

Republicans

36 seats not up for election
Flipped 1 seat
(+1 seat)

29 seats not up for election



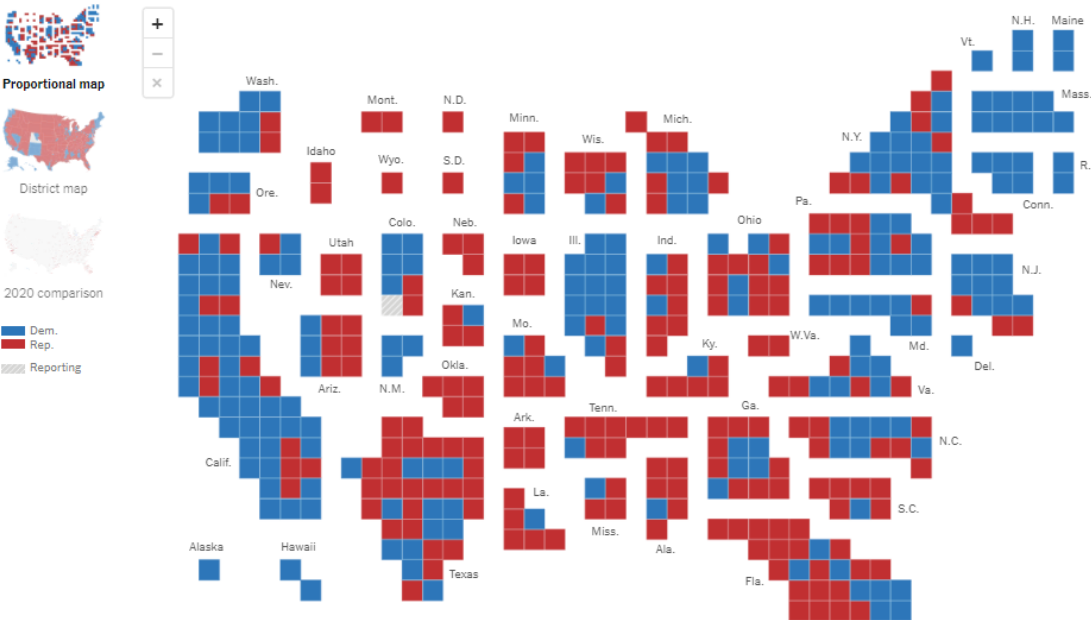
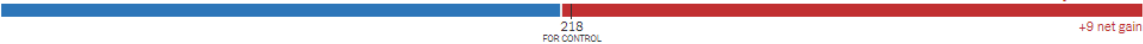
Election Results - House

U.S. House Election Results: Republicans Win

Republicans won control of the House by a far narrower margin than party leaders had expected.

213
Democrats

221
Republicans



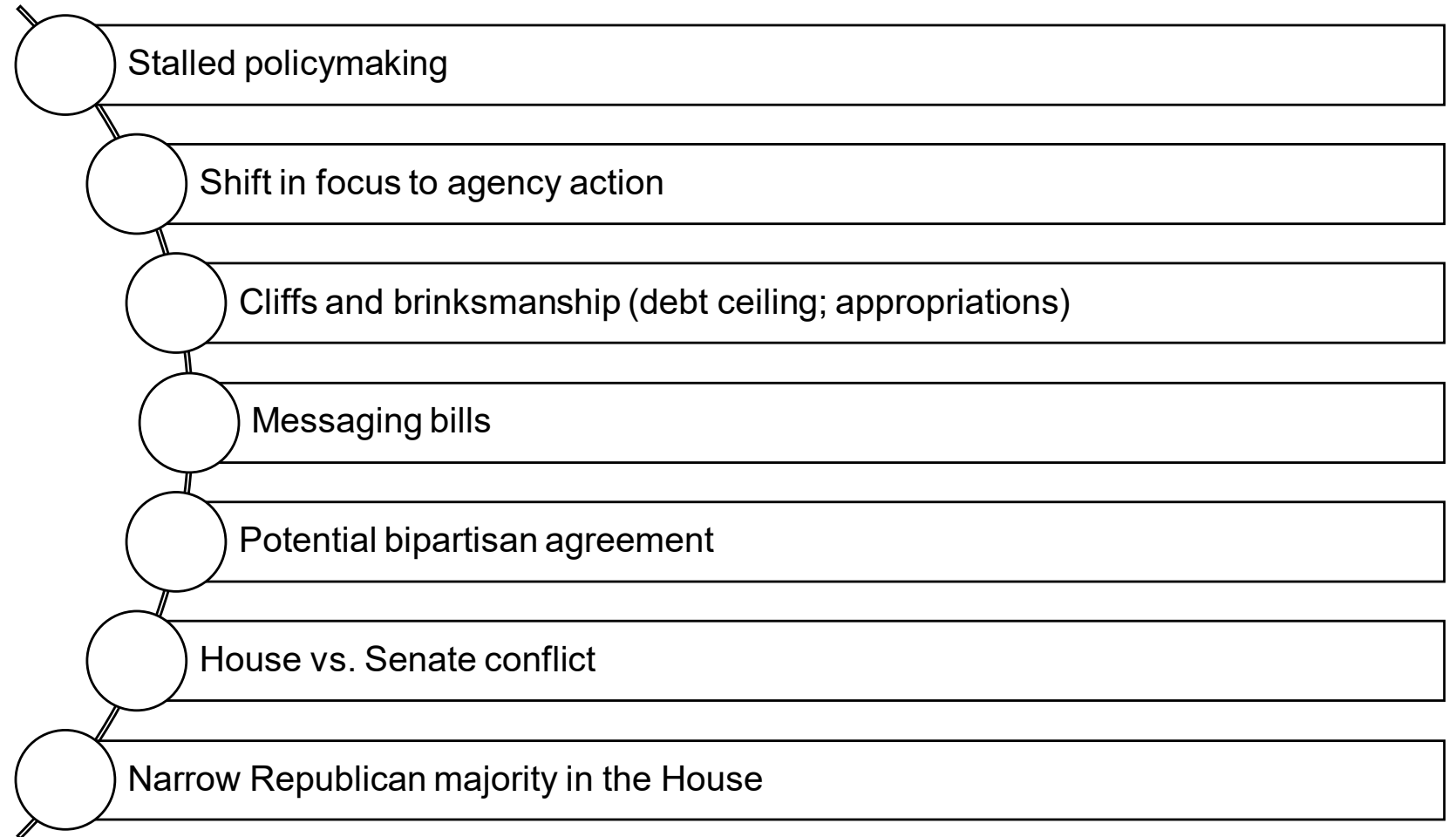
Note: Tally of seats won by party includes uncalled races where all candidates are of the same party.

OVERALL LANDSCAPE

02

Overall Landscape

Landscape: The public policy environment will be subject to a variety of different dynamics, depending on the context:



Overall Landscape

Key Points:

- Divided government means political parties must work together to pass legislation and legislative successes will be more limited.
- Divided government also means the White House will shift focus toward the federal agencies rather than Congress to advance policy goals.
- Expect bipartisan cooperation on issues involving China, Big Tech, and even some energy initiatives.
- With a presidential election in 2024, expect Republican congressional resistance on federal spending, the President's economic record, and how his Administration is implementing previously enacted laws, like the infrastructure bill.
- House Republican leadership has issued an ambitious oversight plan, which is likely to be the focus of much of their attention in the 118th Congress.
- Expect moderate members and caucuses to hold the power, especially the bipartisan Problem Solvers Caucus.

ANTITRUST

03

Key Issue: Antitrust

Background: There has been increasing bipartisan cooperation on certain antitrust issues, particularly as they relate to “Big Tech.” In the 117th Congress, Democrats—with bipartisan support—introduced a number of significant antitrust bills, with several passing at least one chamber of Congress or moving out of committee.

117th Congress: Some of these notable bills include:

- American Innovation and Choice Online Act
- Open App Markets Act
- Merger Filing Fee Modernization Act
- Journalism Competition and Preservation Act

118th Congress:

- Many of the above bills are likely to be reintroduced.
- Several antitrust bills have obtained Republican support in the Senate Judiciary Committee. With Representative Jim Jordan (R-OH) becoming Chair of the House Judiciary Committee, however, these bills will not move forward in the next Congress without his support.
- Despite opportunity for bipartisanship in the Senate, House Republicans are already indicating that the party is not internally aligned on antitrust issues.
 - Representative Jim Jordan (R-OH) and Representative Ken Buck (R-CO) criticized one another in recent months on their approach to antitrust.



Key Issue: Antitrust

Federal Trade Commission (FTC):

- Chair of the FTC, Lina Khan, has made antitrust issues a priority. Democrats have a 3-2 majority that will continue into the next year.
- The FTC will be subject to more scrutiny with Republicans in charge of the House Judiciary Committee, which has oversight over the agency.
- Recently, the FTC sued to block Microsoft's \$69 billion acquisition of Activision—a video game publisher. This is a strong sign of the FTC's aggressive posture to “enforce antitrust laws to ensure maximal efficacy.”



ENERGY

04

Key Issue: Energy

Landscape:

- Republicans [describe](#) maximizing production of domestic energy as a priority.
- Their [energy agenda](#) includes expediting fossil fuel project approval and removing environmental reviews.
- Republicans will grapple with the repercussions of opposing the Inflation Reduction Act, as it doles out significant funds to important members' home states.
- Democrats intend on increasing production as well, although their focus has been on renewable energy.
- Notably, the President [funded](#) the first critical minerals refinery in the United States this year, an action that aligns with the GOP's stated goal of returning manufacturing of such minerals to the United States.

ENERGY & ENVIRONMENT

Republicans plan an energy agenda designed to keep Democrats on their heels

House Republicans are also planning to scrutinize how the Biden administration deploys the \$370 billion in clean energy measures that Congress approved in Democrats' Inflation Reduction Act.

ENERGY & ENVIRONMENT

What's in the Democrats' climate and energy legislation

The bill, dubbed the "Inflation Reduction Act of 2022," would spend nearly \$370 billion on a raft of tax credits to help stimulate adoption of clean energy technologies.

Key Issue: Energy

Legislation: Potential areas of common interest between the parties regarding energy policy goals create the following expectations:

- President Biden to increase Strategic Petroleum Reserve (SPR) releases as needed.
- Legislation increasing domestic fossil fuel production.
- Streamlining the process for major infrastructure projects.
- Expanding hydropower production.
- Domesticating the production of critical minerals and reducing dependence on China's production.



ENVIRONMENTAL, SOCIAL, AND CORPORATE GOVERNANCE

05

Key Issue: Environmental, Social, and Corporate Governance

Background: Republicans have become increasingly critical of environmental, social, and corporate governance (ESG) investing, and we can expect that to continue in the 118th Congress.

Congress:

- A Republican House will not pursue ESG-friendly legislation advanced by Democrats, such as the ESG Disclosure Simplification Act, which passed the House in 2021.
 - Even in the Democratic Senate, it is unlikely this bill could receive 60 votes.
- Following on the heels of state-level legislative efforts, a Republican House may pass legislation targeting ESG practices, such as the Ensuring Sound Guidance Act.
- House Republicans likely will attempt to block the Securities and Exchange Commission (SEC) climate disclosure rulemaking, but the White House and Democrats will oppose these efforts.

Republicans plan legislative assault on 'woke' ESG firms

By Nick Sobczyk | 06/07/2022 06:23 AM EDT



Elon Musk
@elonmusk

Exxon is rated top ten best in world for environment, social & governance (ESG) by S&P 500, while Tesla didn't make the list!

ESG is a scam. It has been weaponized by phony social justice warriors.

FINANCIAL SERVICES

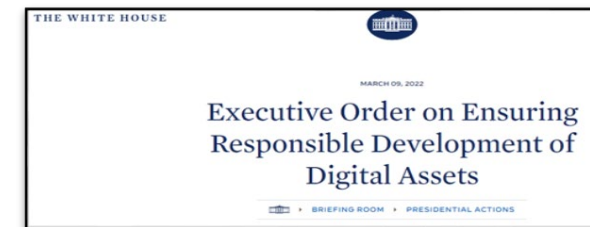
06

Key Issue: Financial Services

Landscape: Given the split Congress, we expect Republicans to pursue de-regulation of the financial services industry and the Democrats to pursue increased regulation. We expect minimal legislative progress with divided government.

Policy Changes:

- A Republican House will not pursue ESG-friendly legislation advanced by Democrats, such as the ESG Disclosure Simplification Act, which passed the House in 2021.
- President Biden has used executive action to regulate the financial services industry already this year, when he [signed an executive order](#) to protect consumers and financial stability from systemic risk created by “advances in digital and distributed ledger technology for financial services.”
 - Unilateral executive action likely will continue with a divided Congress.
- Additionally, at least one influential think tank [has recommended](#) further strengthening the regulations around fintech and digital assets, although the Administration has not yet adopted this position.



GOVERNMENT CONTRACTING

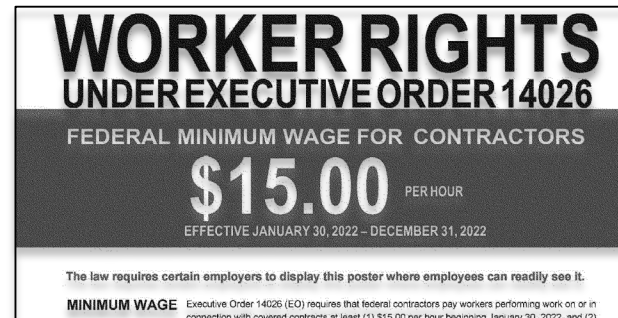
07

Key Issue: Government Contracting

Background: The Biden Administration has imposed a variety of new requirements on federal contractors (e.g., a \$15 minimum wage, vaccine mandates, expanded use of project labor agreements, climate disclosure, and stronger “Buy American” policies) and it can be expected to continue to advance similar policies moving forward.

Congress: House Republicans have opposed some of these measures and could seek to take action against them in the majority, although these efforts would have trouble advancing in a Democratic Senate.

National Security: Further national security-related requirements are also possible (e.g., recent requirements for defense contractors to disclose China work).



GOP measure would stop federal contractor minimum wage from becoming permanent

By [Leo Shane III](#)

Friday, Jul 8

HEALTHCARE

08

Key Issue: Healthcare

Topline: The Administration is focused on implementing big wins in the Inflation Reduction Act (IRA) including:

- Three-year extension of expanded premium tax subsidies from the American Rescue Plan (ARP).
- Major drug pricing reforms, including Medicare drug price negotiation, inflation rebates for Medicare, and Part D redesign.

Agency Action: The Department of Health and Human Services (HHS) continues to promulgate rules as required by the IRA.

- Expect more HHS and Food and Drug Administration (FDA) rulemaking, including rules on abortion, nondiscrimination in the Affordable Care Act (ACA), increased drug spending transparency, and surprise billing.

COVID-19: The Administration continues to focus on COVID-19 with the National COVID-19 Preparedness Plan.

- Biden has asked Congress for \$22 billion in additional funding for COVID testing, vaccines, and treatments.

Key Issue: Healthcare

Senate: Democrats secured their big healthcare win in the IRA.

- Health, Education, Labor, and Pensions (HELP) Committee Republicans will continue to draft legislation to challenge the IRA drug negotiation and premium policies.
- There's potential for bipartisan bills targeting mental health and telemedicine:
 - The Advancing Telehealth Beyond COVID-19 Act of 2022 has already passed the House.
 - In the Senate, we may see movement on bills like the MENTAL Health for Kids and Underserved Act.

House: Leadership created the Healthy Future Task Force to “modernize our healthcare system,” with broad concepts:

- Price transparency and competition.
- Increased access to telemedicine.
- Stronger oversight.



INFRASTRUCTURE

09

Key Issue: Infrastructure

Background: The outgoing Congress has passed significant infrastructure legislation, including the \$1.2 trillion bipartisan Infrastructure Investment and Jobs Act (IIJA), as well as the ARP and the IRA.

Executive Branch: The Biden Administration will continue to focus on implementing the IIJA and IRA according to its priorities (clean energy, mass transit and electric vehicles, “Buy American,” and labor-friendly policies).

Congress: In general, further legislation regarding infrastructure is unlikely with a Republican-controlled House, especially given GOP spending concerns.

- Republicans may conduct oversight of the Biden Administration’s implementation of infrastructure legislation.

Permitting: Although there is bipartisan appetite to overhaul federal permitting laws, with an emphasis on energy projects, considerable differences among key players make the prospects for any legislation uncertain. Compromise will be necessary for anything to pass.

- Senator Joe Manchin’s (D-WV) bill – opposition from both sides.
- Aggressive House Republican bills (e.g., from Representative Garret Graves (R-LA)).
- Action on permitting reform is possible, but unlikely, in the lame duck session.



LABOR

10

Key Issue: Labor

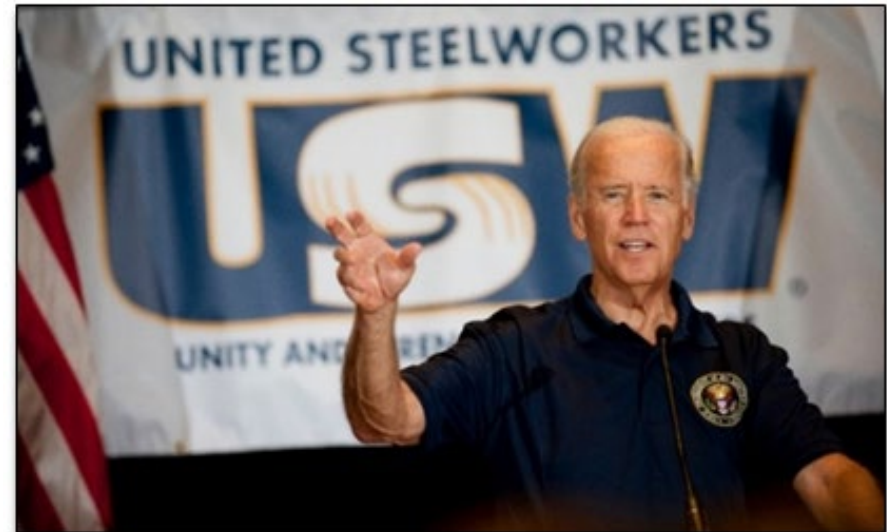
Background: President Biden leans in to Republican branding as the “most pro-union president” in history.

Agency Actions: Biden’s Executive Orders and Department of Labor (DOL) and National Labor Relations Board (NLRB) rulemakings are strongly pro-union:

- Increasing the minimum wage for federal contractors.
- Clarifying “joint employee” and gig worker regulations.
- Tightening “independent contractor” under the Fair Labor Standards Act (FLSA).

Future Action: President Biden supports progressive labor legislation, including:

- Protecting the Right to Organize (PRO) Act;
- Paycheck Fairness Act;
- Raise the Wage Act.



Key Issue: Labor

Senate: Senator Bernie Sanders (I-VT), an active critic of President Biden on labor, will chair HELP.

- Senate Democrats' key labor priorities include:
 - Protecting the Right to Organize (PRO) Act.
 - Paycheck Fairness Act.
 - Raise the Wage Act.
- In a divided Senate, President Biden's progressive labor priorities are unlikely to pass. Agency action will remain the space to watch.

House: For House Republicans, "cracking down on anything they see as tilting the scales toward organized labor will be one of their first orders of business," including:

- Targeting employer vaccine mandates and pandemic regulations.
- NLRB audit and reforms.
- Limiting union power.
- Oversight of COVID relief.
- Oversight of ACA subsidies/cost of employer-sponsored plans.



NATIONAL SECURITY

11

Key Issue: National Security

China: House Republicans likely will devote significant attention to China. The Senate may address these issues on a more bipartisan basis. Slim margins make any major change in U.S.-China policy unlikely.

- Supply chains and trade, export controls, Taiwan, and COVID-19.
- House Republican “Select Committee on China,” to be chaired by Representative Mike Gallagher (R-WI).
- Strategic Competition Act.
- China Grand Strategy Commission.
- Countering Communist China Act.
- Block the Tok Act.



Key Issue: National Security

OPEC: Following the recent production cut by OPEC, some members of Congress, from both parties, may push legislation targeting OPEC and Saudi Arabia.

- NOPECAct.

Defense Spending:

- Congressional Republicans (as well as many Democrats) can be expected to push for significant defense spending increases, notwithstanding general spending misgivings.
- As always, national security (or other) legislation likely will be folded into the year-end National Defense Authorization Act (NDAA).

Areas of Controversy: Additional assistance to Ukraine will be an area of disagreement between House Republicans and Democrats.

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “No Oil Producing and
5 Exporting Cartels Act of 2021” or “NOPEC”.

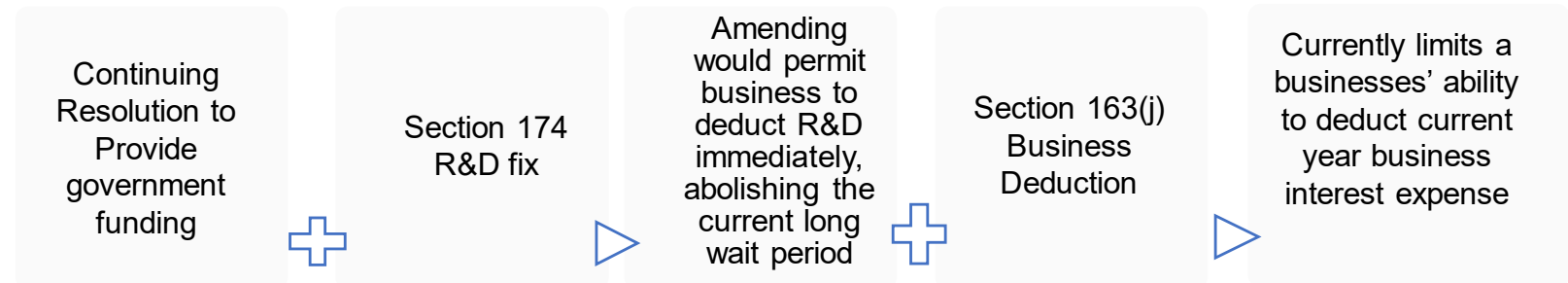
TAXES

12

Key Issue: Taxes

Landscape: Currently, the tax landscape is divided into pressing, late-2022 and early-2023 policy changes and long-term policy changes once the midterm winners are sworn in. In the short term, Congress will likely pass a continuing resolution to fund the government and may implement fixes to the Section 174 Research & Development (R&D) Tax Amortization issue and the Section 163(j) calculation for business expense deductions. If these fixes are not implemented in the short-term, they'll likely be included in the long-term package.

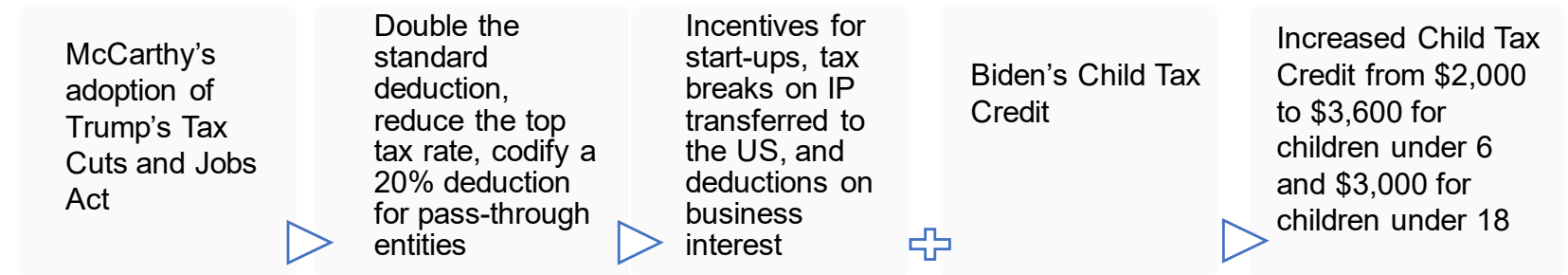
Congress: In the short term, a tax package would likely include the following fixes:



Key Issue: Taxes

Landscape: In the long term, the Democrats and Republicans each have opposing policy goals. Democrats want to pass President Biden's Child Tax Credit. Leader McCarthy seeks to fully extend the individual taxes from the 2017 Tax Cuts and Jobs Act (TCJA) and to roll back the IRS funding Democrats enacted this summer, but these changes are unlikely to get to the President's desk. Although significant tax reform is not likely to pass a divided 118th Congress, with recent GOP support for the Child Tax Credit, it's possible a compromise with both the credit and some amount of the cuts from Leader McCarthy's plan passes.

Congress: Key aspects of the GOP and Democrats' tax plans include:



 **The Washington Post** @washingtonpost · Oct 17

Republicans plan to push to extend key parts of President Donald Trump's tax cuts if they take control of Congress in this fall's elections, aiming to force President Biden to codify trillions of dollars worth of lower taxes touted by his predecessor.

TAXES · Published October 21, 2022 1:13pm EDT

Republicans eye possible extension of Trump tax cuts after midterm elections

McCarthy confirms GOP wants to 'lock in' the 2017 Tax Cuts and Jobs Act

TECHNOLOGY

13

Key Issue: Technology

Background: As discussed in the antitrust context, there is some overlap between Republicans and Democrats on the need to further regulate Big Tech, but their priorities differ. Republicans are most focused on issues of censorship and alleged political bias (e.g., Twitter), while Democrats have raised concerns with disinformation on platforms such as Facebook and Twitter.

118th Congress:

- House Republicans will focus on issues of censorship, alleged bias, and Section 230 immunity.
- There may continue to be opportunities for bipartisanship in the antitrust space.
- Congress continues to examine the best way to regulate digital assets. Different bipartisan factions have emerged that do not fall neatly down party lines.

Executive Branch:

- On antitrust issues, the FTC will continue to have a 3-2 Democratic majority, though will likely face continued scrutiny from incoming House Judiciary Chair Jim Jordan (R-OH).
- For digital assets, the Biden Administration has adopted a “whole-of-government approach” with various agencies (e.g., SEC, Commodity Futures Trading Commission, the Federal Reserve) continuing to consider how to best regulate in this space.



TRADE

14

Key Issue: Trade

Congress: Divisive politics surrounding trade, both within and between the two parties, make any possible action on trade in the new Congress uncertain. Possible opportunities for congressional action or oversight include:

- Supply chains and China.
- TRIPS waiver for COVID-19 vaccine.
- USMCA Mexico energy policy negotiations.
- Other legislation (Generalized System of Preferences; Miscellaneous Tariff Bill; Trade Adjustment Assistance).
- Republicans control the House, but slim margins make any new trade deals unlikely.



Key Issue: Trade

Background: Despite some differences, the Biden Administration has continued many aspects of the Trump Administration's trade policies, including largely maintaining tariffs on China.

Executive Branch:

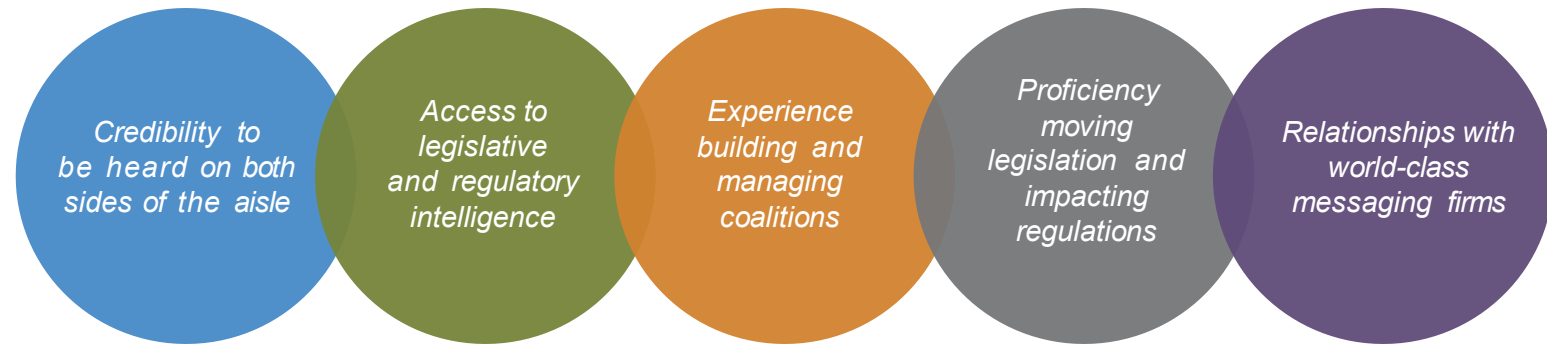
- Vague regional “economic frameworks” rather than traditional free trade agreements.
- Supply chains, China, and export controls.



ATTORNEY BIOS

15

THE GIBSON DUNN ADVANTAGE





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Michael Bopp is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher. He brings his extensive government and private-sector experience to help clients navigate through the most difficult crises, often involving investigations as well as public policy and media challenges. He chairs the Congressional Investigations Subgroup and he is a member of the White Collar Defense and Investigations Crisis Management Practice Groups. He also co-chairs the firm's Public Policy Practice Group and is a member of its Financial Institutions Practice Group.

Mr. Bopp's practice focuses on congressional investigations, internal corporate investigations, and other government investigations. He also advises clients on public policy and regulatory consulting in a variety of fields, and managing and responding to major crises involving multiple government agencies and branches. Mr. Bopp is one of only two attorneys in the country listed in Band 1 for Congressional Investigations by Chambers. BTI Consulting named Mr. Bopp to its 2018 BTI Client Service All-Stars list, recognizing the "lawyers who truly stand out as delivering the absolute best client service" as determined by a poll of corporate counsel.

A particular specialty is preparing people to testify at congressional hearings and for other high-profile, public, often contentious events. Mr. Bopp served as the debate coach for Senator Susan Collins in the 2020 election cycle. About the race, Politico noted that Senator Collins "staged one of the most remarkable Senate comebacks of the past decade."

Mr. Bopp has extensive experience representing clients in congressional, executive branch, and internal investigations. During more than a decade on Capitol Hill, Mr. Bopp led or played a key role in major investigations in both the Senate and House of Representatives, including four special investigations.

Mr. Bopp received his law degree cum laude from Harvard Law School where he was Articles Editor on the Journal of Law and Public Policy. He graduated magna cum laude, with honors, in public policy from Brown University.

Mr. Bopp's full biography can be viewed [here](#).



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A partner in Gibson, Dunn & Crutcher's Washington, DC office, Roscoe Jones co-chairs the Firm's Public Policy Group and serves as a core member of the Congressional Investigations practice group. Recognized in 2022 as one of *Lawdragon's* "500 Leading Lawyers in America," Mr. Jones has represented companies, nonprofits, and individuals in legislative and policy matters before the U.S. Congress and Executive Branch.

Mr. Jones has almost a decade of Capitol Hill experience advising three U.S. Senators and a member of Congress and political experience in the executive branch. Drawing upon that experience, Mr. Jones's practice focuses on promoting and protecting clients' interests before the U.S. Congress and the Administration, including providing a range of public policy services to clients such as strategic counseling, advocacy, coalition building, political intelligence gathering, substantive policy expertise, legislative drafting, and message development.

Mr. Jones also advises on congressional investigations, assists clients in preparing to testify before Congress, and helps clients respond to major crises involving Congress. In 2022, the National Law Journal honored Gibson Dunn as a Finalist for its Crisis Management and Government Oversight award, recognizing firms that have guided clients through government proceedings in Washington, DC, including "preparing a client to provide testimony to Congress on a topic lawmakers are considering taking action on."

Mr. Jones graduated with high honors from Stanford University, and received a J.D. from the University of Virginia Law School, where he was Editor-in-Chief of the *Journal of Social Policy & Law* and co-founder of the Law School's Center for Race & Law. Mr. Jones clerked for Judge Carl E. Stewart on the U.S. Court of Appeals for the Fifth Circuit and Judge Alexander Williams, Jr., on the U.S. District Court for the District of Maryland. Early in his career, he served as the Francis D. Murnaghan, Jr., Appellate Advocacy Fellow at the Public Justice Center. He has been published in the *Harvard Law & Policy Review*.

Mr. Jones' full biography can be viewed [here](#).



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Danny Smith is of counsel in the Washington, D.C. office of Gibson, Dunn & Crutcher. He is a member of the Public Policy and Congressional Investigations practice groups.

Danny's practice focuses on advancing clients' interests before the U.S. Congress and the Executive Branch. He provides a range of services to clients, including political advice, intelligence gathering, policy expertise, communications guidance, and legislative analysis and drafting.

Prior to joining the firm, Danny started his career on Capitol Hill with then-Majority Leader Harry Reid. He then worked for U.S. Senator Cory A. Booker for nearly a decade, starting as a Legislative Correspondent and was subsequently promoted to Deputy Counsel, Counsel, and Chief Counsel. As Senator Booker's Chief Counsel on the U.S. Senate Committee on the Judiciary, Subcommittee on Criminal Justice and Counterterrorism, Danny managed and directed Senator Booker's work before the Committee and provided strategic and political advice to the Senator on a range of policy issues, including antitrust, civil rights, criminal justice, homeland security, intellectual property, national security, nominations to the Executive and Judicial Branches, privacy, and technology. During his tenure, Danny successfully oversaw or contributed to the passage of the Fair Chance to Compete for Jobs Act, the Emmett Till Antilynching Act, and the landmark First Step Act. Danny frequently worked and coordinated with Senate Democratic Leadership on Senate Judiciary Committee matters due to Senator Booker's position on Majority Leader Chuck Schumer's Leadership team.

Danny received his law degree from Loyola University Chicago School of Law. He also graduated from the University of Notre Dame with a Bachelor of Arts in Political Science and Philosophy.

Mr. Smith's full biography can be viewed [here](#).



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Ms. Neely served as Director of Governmental Affairs for the Senate Homeland Security and Governmental Affairs and General Counsel to Senator Rob Portman. Under Senator Portman's chairmanship, she also served as Deputy Chief Counsel for the Permanent Subcommittee on Investigations. In those roles, she managed Senator Portman's regulatory reform agenda and led oversight of federal government agencies and investigations into private entities. She previously served in several other Capitol Hill offices including as Oversight Counsel for the House of Representatives Committee on Ways and Means.

At Gibson Dunn, Ms. Neely has represented clients undergoing investigations by several congressional committees, including the Senate Health, Education, Labor, and Pensions Committee, the Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, the House Committee on Oversight and Reform, the House Energy and Commerce Committee, and both the Senate and House Judiciary Committees. She has helped witnesses prepare to testify before the Senate Banking, Housing, and Urban Affairs Committee, the Senate and House Agriculture Committees, and the House Financial Services Committee.

In 2003, Ms. Neely graduated *cum laude* from Princeton University, where she majored in English and earned a certificate in Medieval Studies. She then served for two years on United States Senator Elizabeth Dole's staff as a legislative correspondent, focusing on banking, housing, budget, and tax issues. Ms. Neely is admitted to practice law in the District of Columbia and before the United States Courts of Appeals for the District of Columbia Circuit and the Eleventh Circuit.

Ms. Neely's full biography can be viewed [here](#).